Ng Ben Thong & Ors v Krishnan a/l Arumugam

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-702 OF 1993
KAMALANATHAN RATNAM JC
14 NOVEMBER 1997

Civil Procedure *— Pleadings — Defence — Defence unsubstantiated by evidence — Whether pleadings are evidence — Whether party has to adduce evidence to substantiate its pleadings — Whether court could rely on the defendant's pleadings to dismiss plaintiff's case*

Evidence *— Witness — Absent witness — Whether court could rely on pleadings of absent witness — Whether pleadings are evidence — Whether party has to adduce evidence to substantiate its pleadings*

Land Law *— Trespass — Unlawful occupation — Whether owners have right to eject illegal occupiers — Whether court should consider plea of homelessness*

The plaintiffs were registered owners of seven lots of land ('the lands'). The plaintiffs discovered that the defendants had illegally occupied the lands and had built wooden huts on the lands. The plaintiffs maintained that they had not granted permission nor given consent to the defendant or his family to occupy the lands. It was pleaded by the defendant that, inter alia, the first and second plaintiffs had visited the lands and granted permission to the defendant's family to stay on the lands. It was also pleaded that by their consent the plaintiffs had acquiesced to the tenancy. At the close of the plaintiffs' case, the defendant was absent and counsel for the defendant conceded that he would be unable to adduce evidence without his client and the court was asked to rely on the defendant's pleadings and to dismiss the case.

Held, granting vacant possession of the lands to the plaintiffs:

(1) Pleadings are not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings. In the circumstances, the defendant's pleadings, namely his defence, remained as bare allegations, unsubstantiated by evidence (see p 583E–H).

(2) The defendant being an illegal occupier was in no better or worse position than a squatter. A squatter has no rights. He enters illegally into occupation of another's land with the intention of staying as long as he can. Once the court finds that his occupation is illegal or that he is a squatter, the plea of homelessness must not sway the court from its duty to the owner of the land. The owner must be given the right to immediately eject and evict the illegal occupiers (see p 584E–H).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemilik berdaftar tujuh lot tanah ('tanah tersebut'). Plaintif-plaintif mendapati bahawa defendan-defendan telah menduduki tanah tersebut secara tidak sah dan telah mendirikan pondok-pondok kayu atas tanah tersebut. Plaintif-plaintif menegaskan bahawa mereka tidak memberikan keizinan atau pun memberikan kebenaran kepada defendan atau keluarganya untuk menduduki tanah tersebut. Ia dihujahkan oleh defendan bahawa, antara lain, plaintif pertama dan kedua telah melawat tanah tersebut dan memberikan keizinan kepada keluarga defendan untuk menetap atas tanah tersebut. Adalah juga dihujahkan menerusi kebenaran mereka plaintif-plaintif telah mengakur kepada penyewaan. Di penutup kes plaintif-plaintif, defendan tidak hadir dan peguam defendan berhujah bahawa beliau tidak dapat mengemukakan keterangan tanpa kliennya dan mahkamah diminta bergantung pada pliding defendan dan untuk menolak kes.

Diputuskan, memberikan milikan kosong tanah tersebut kepada plaintif-plaintif:

(1) Pliding bukanlah keterangan. Ia cumalah pengataan kosong kes suatu pihak. Pihak hendaklah mengemukakan keterangan bagi memperkukuhkan plidingnya. Manakala pliding tidak boleh menjadi keterangan dalam ketiadaan keterangan dikemukakan di mahkamah, begitu juga keterangan tidak boleh dikemukakan luar daripada pliding. Dalam keadaan sedemikian, pliding defendan, iaitu pembelaannya, kekal sebagai pengataan kosong, tanpa disokong oleh keterangan (lihat ms 583E–H).

(2) Defendan yang merupakan penghuni tidak sah tidak berada dalam keadaan yang lebih baik atau lebih teruk daripada seorang setinggan. Setinggan tidak mempunyai hak. Dia masuk tanah orang lain secara haram dengan tujuan menetap seberapa lama yang boleh. Sebaik sahaja mahkamah mendapati bahawa penghuniannya adalah haram atau bahawa dia adalah setinggan, hujah tiada tempat berteduh mestilah tidak mempengaruhi mahkamah dalam kewajipannya kepada pemilik tanah. Pemilik mestilah diberikan hak untuk mengusir penghuni haram dengan serta merta (lihat ms 584E–G).]

Notes

For cases on defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2560–2563.

For cases on absent witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1635–1637.

For cases on unlawful occupation, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2981–2985.

Case referred to

McPhail v Persons, Names Unknown and another case [1973] 1 Ch 447 (refd)

Legislation referred to

Rules of the High Court 1980 O 89
Rules of the Supreme Court O 113 [UK]

Victoria Ng (*YK Ng & Co*) for the plaintiffs.
T Jayadeva (*PH Ong* with him) (*Syarikat Radhakrishnan*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

The plaintiffs are the registered owners of seven lots of land held under Geran 7899 Lot 234, Geran 7898 Lot 233, CT 26561 Lot 232, CT 26560 Lot 231, CT 26559 Lot 230, CT 26558 Lot 229, CT 26557 Lot 228 ('the said lands'). The first and second plaintiffs became registered as trustees of ¾ share of the lands held under Geran 7899 Lot 234 and Geran 7898 Lot 233, in 1983 and the third plaintiff became the registered owner of ¼ share of the said two lots of land in 1985. In respect of the remaining five lots of land, the first and second plaintiffs became registered as trustees of ¾ share of the said five lots in 1975 and the third plaintiff became the registered owner of ¼ share of the said five lots in 1985. The first plaintiff is also a director of the third plaintiff.

The court's findings

Sometime in February 1989, the first plaintiff visited the said lands situated off Jalan Thamby Abdullah in Brickfields, Kuala Lumpur to survey the same for the purpose of creating a car park. The first plaintiff discovered that unknown persons had illegally occupied the said lands and erected a few wooden huts thereon. The plaintiffs then discovered that one of the huts was being used as residence by the defendant and his family, another hut was being used as a place of worship of a Hindu shrine and another hut being used by the defendant's mother. The defendant was also using the said lands as a private car park and collecting fees and rearing cows thereon.

The plaintiffs maintained that they had not granted permission nor given consent to the defendant or his family or to his father to occupy the said lands. As the first plaintiff did not know the identity of the illegal occupiers then in February 1989, the first plaintiff lodged a police report at the Brickfields Police Station. PW2 testified that he had left the management of the said lands entirely to his brother PW1. However, PW2 said that when he visited the said lands in 1980, he saw the defendant there but at that time he had no knowledge that the illegal occupier was the defendant. Both PW1 and PW2 (the first and second plaintiffs) testified that the previous registered owner of the said lands was their late uncle, Ng Kong Kai. When they took over the said lands as co-trustees, the said lands were vacant. They further testified that their late father did not grant permission to the defendant's father to occupy the said lands for a monthly

rental since the time of the Japanese occupation in the 1940s because in the 1940s the plaintiffs' family had not bought over the said lands. A

The earlier summary proceedings

In 1990, the plaintiffs filed summary proceedings under O 89 of the Rules of the High Court 1980 ('the RHC') for possession of the said lands under Kuala Lumpur High Court Originating Summons No S5–24–1114–90 ('the OS action'). The defendants in the said proceedings were cited as persons unknown to the plaintiffs. Upon service of the OS action, the defendant herein entered an appearance. The OS action was heard on 1 December 1992 and was dismissed on the grounds that summary proceedings were inappropriate as there were triable issues raised by the defendant. B C

The negotiations

Subsequently, both PW1 and the defendant held several meetings to resolve the issue of unlawful occupation of the said lands. The first meeting was held at the plaintiffs' solicitors' office in the presence of the defendant and his solicitor and PW1 and his solicitor. At the said meeting, the defendant requested for two weeks to find alternative accommodation and also sought compensation from the plaintiffs. PW1 refused to consider the question of compensation but agreed to grant an extension to 1 April 1991 to vacate the said lands. D E

The second meeting of all parties involved, together with their respective solicitors, was held on 1 April 1991 wherein the defendant again requested for a further one-month extension and again requested for compensation. PW1 again refused to grant compensation but agreed to the extension of one month and the defendant was to move out by 30 April 1991. F

A third meeting fixed for 30 April 1991 was aborted by the defendant. The plaintiffs' solicitors were informed by the defendant's solicitors that since the defendant was unable to find any alternative accommodation by 29 April 1991 there was no purpose in having the meeting on 30 April 1991. G

The formal notice to quit

On 12 October 1993, the plaintiffs' solicitors formally served on the defendant personally a notice to quit and to deliver vacant possession of the said lands on or before 19 October 1993. This writ was then issued. H

Final effort to settle

On 11 April 1994, another meeting was held in the office of the defendant's present solicitors. At this meeting, the defendant did not attend but sent his son and daughter as his representatives. PW1 attended with his solicitors. At the said meeting, the defendant's daughter, named Valli, demanded RM200,000 as compensation. This was flatly refused by the plaintiffs and again negotiations broke down. I

Adjournment of the case for counsel to visit the lands

After the first plaintiff had testified, and by consent, both counsel wished to visit the scene before the defendant's counsel began his cross-examination. Since the case was scheduled for two days, I granted the request. At this point of time, it is relevant to note that when the case commenced, the defendant was conspicuously absent. The next day again, the defendant was absent. After the plaintiffs had closed their case, Mr Jayadeva for the defendant conceded that he would be unable to adduce evidence without his client and wished to rely on the evidence before the court.

The defence

In his defence, the defendant had pleaded that his late father had built the wooden huts on the said lands and had been paying a rental of RM60 per month to the first and second plaintiffs' father. The said rental was paid up to 1960 only because thereafter no one came to collect the rentals. The defendant further alleged in his defence that both the first and second plaintiffs had visited the said lands and had granted permission to the defendant's family to stay on the said lands. Further, the first plaintiff had no objections to the defendant squatting on the said lands. It was also pleaded that by their consent the plaintiffs had acquiesced to the said tenancy.

I am asked by the defence to rely on its pleadings and to dismiss this case. The defendant must realize that pleadings is not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings. Pleadings and evidence become the heart and soul of a case. They complement each other.

In the case before me for reasons best known to himself, the defendant did not turn up in court. An opportunity was given when the case was adjourned, before his counsel commenced cross-examination. Both counsel went to the *locus in quo*. Surely if the defendant was interested in defending this case, he would have at least seen his counsel and recognized him and could have attended court the next day. In the circumstances, the defendant's pleadings, namely his defence, remains as bare allegations, unsubstantiated by the live-giving evidence that must of necessity course through the veins of his case to sustain in. Bereft of any evidence, the defendant's case was a non-starter. On the other hand, the case for the plaintiffs was fully substantiated by the evidence of both PW1 and PW2. Each of them gave their evidence very candidly and denied the averments of the defence. I have no reason to doubt their evidence.

The position of the first and second plaintiffs

The first plaintiff (PW1) and the second plaintiff (PW2) are the registered owners of the seven lots of land in question together with the third plaintiff. The endorsement on the respective grant of title appears as 'Ng Ben Thong and Ng Beng Ong as trustees – ¾ share' and 'Ghee Hong

Credit & Leasing Sdn Bhd — ¼ share'. PW1 and PW2 became the registered co-trustees of the said pieces of land sometime in 1976 for Ghee Hong & Co, a partnership firm. Both PW1 and PW2 are also partners of Ghee Hong & Co. In respect of the remainder ¼ share of the said lands, the same is held by the third plaintiff. Both the first and second plaintiffs are directors and shareholders of the third plaintiff. It is therefore obvious from the above found facts that both the first and second plaintiffs are suing in their own capacity as persons having a beneficial interest in the said lands and as trustees of the said lands.

The legal position of trespasser/illegal occupier

From the unchallenged evidence of the plaintiffs, I have no hesitation in finding the defendant an illegal occupier of the plaintiffs' lands. In *McPhail v Persons, Names Unknown and another case* [1973] 1 Ch 447, the Court of Appeal had to deal with two claims for possession under RSC O 113 wherein squatters had broken into empty houses and started to live in them without any authority from the respective owners who in both cases obtained orders that they 'do recover possession'. In dismissing the appeal by the squatters, the court held that since the squatters had entered and remained in the houses as trespassers, the court had no discretion to suspend the orders for possession. Order 113 of the RSC is equivalent to our O 89 of the RHC.

In the case before me, the defendant being an illegal occupier is in no better or worse position than a squatter. A squatter has no rights. He enters illegally into occupation of another's land with an intention of staying as long as he can, *gratis*, without a care in the world. He might attempt to justify or excuse his conduct by various pleas and ploys. But once the court finds that his occupation is illegal or that he is a squatter, the plea of homelessness must not sway the court from its duty to the owner of the land. It is not without reason that the old adage that charity begins at home must have been coined. The court's conduct might seem uncharitable to the defendant but illegal occupation, if recognized, would lead to squatters and illegal immigrants moving in with impunity, so long as a land is vacant or a house untenanted. Chaos will no doubt be the order of the day. The owner must be given the right to immediately eject and evict the illegal occupiers. If the latter wants time to move out, it must be at the behest and goodwill of the landlord. This court ought not to consider a plea by an illegal occupier for any extension of time. He has no right as such. Having found as a fact that the defendant was an illegal occupier, there is no necessity for me to consider the defence submission, in the absence of the defendant giving evidence, that his was a tenancy coupled with an equity. I therefore found for the plaintiffs and granted:

(1) vacant possession of the said lands;

(2) cost of demolition and removal of the wooden huts and structures erected on the said lands; and

(3) costs.

Order accordingly.

Reported by Eugene Lee Hong Whye